

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Modernizing the E-rate)	WC Docket No. 13-184
Program for Schools and Libraries)	

To: The Commission

**REPLY COMMENTS OF THE NAVAJO NATION TELECOMMUNICATIONS
REGULATORY COMMISSION (NNTRC)**

The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”), through undersigned counsel, and pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419), respectfully submits these Reply Comments in the above-referenced proceeding in response to Notice of Proposed Rulemaking, issued July 23, 2013.¹ In support of these Reply Comments, NNTRC submits:

In its Comments, filed September 16, 2013, the NNTRC responded generally to the *E-rate NPRM*, pointing out the fundamental problem with the definition of “library,” as interpreted by the FCC, and the need to recognize the sovereignty of Tribes when it comes to designating what qualifies as a library on their reservations. The NNTRC also pointed out the need for flexibility for Tribes in complying with the tight deadlines established by USAC, especially as those deadlines related to construction projects, which often take much longer on tribal lands

¹ Notice of Proposed Rulemaking, FCC 13-100, released July 23, 2013 (hereinafter “*E-rate NPRM*”). The Commission set September 16, 2013 as the date for filing comments and October 16, 2013 for filing reply comments. By Public Notice, DA 13-2025, dated October 17, 2013, the FCC reset the date for filing reply comments to November 8, 2013, following the government shutdown. These Comments are therefore timely filed.

based on the remoteness and ruggedness of those areas, as well as the general lack of local expertise in wiring schools and libraries.

NNTRC now turns to portions of the *E-rate NPRM* which seek input from tribes as to specific questions asked therein.

1. E-rate Tribal Priority (Paragraph 114)

The NNTRC fully supports the adoption of a Tribal Priority for the E-rate program.² As the Commission points out, Indian Country represents some of the most unserved and underserved areas of America.³ Many reservations, such as the Navajo Nation, are so remote that broadband has simply passed them by. Providing connections for schools and libraries on the Navajo Nation, especially outside of the major towns such as Window Rock, Tuba City, and Kayenta, has proven difficult, and expensive.

The Tribal Priority in broadcasting has already proven to be successful. To date, the Media Bureau has granted two new allocations for FM facilities, one for Navajo Technical College in Crownpoint, New Mexico,⁴ and one for Peach Springs, Arizona for the Hualapai Tribe.⁵ A second Tribal Priority broadcast channel has been sought on the Navajo Nation for Tohatchi, NM.⁶ Each of these allocations will bring new, diverse, Native voices to the airwaves, and act as important sources of news and information for the communities they will serve.

In establishing the Broadcast Tribal Priority, the FCC had this to say about the relationship between the FCC and tribes:

² *E-rate NPRM*, ¶ 114.

³ See *Improving Communications Services for Native Nations, Notice of Inquiry*, CG Docket 11-41, released March 4, 2011, ¶¶ 1-3.

⁴ *Amendment to Section 73.202(b) (Crownpoint, NM)*, DA 13-325, released March 1, 2013.

⁵ *Amendment to Section 73.202(b) (Peach Springs, AZ)*, DA 13-326, released March 1, 2013.

⁶ See, Petition of Navajo Nation (KTNN) to allocate Channel 268C2 to Tohatchi, NM, filed July 10, 2013.

In the *Rural NPRM*, the Commission noted the marked disparity in the Native American and Alaskan Native population of the United States, compared to the number of radio stations licensed to, or providing significant signal coverage to, lands occupied by members of federally recognized American Indian Tribes and Alaska Native Villages. The Commission also emphasized the historic federal trust relationship between itself and the Tribes, as part of the relationship between the United States government and the sovereign nations that are Tribes. More specifically, the Commission noted that Tribes have an obligation to “maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,” within their jurisdictions, and that the Commission has a longstanding policy of promoting tribal self-sufficiency and economic development, as well as providing adequate access to communications services to Tribes.⁷

A similar analysis led the FCC to adopt the Tribal Enhanced Lifeline program in 2000, when the FCC took substantial steps to close the gap of telephone ownership by creating a special program to incentivize carriers to offer telephone service in Indian Country.

An important goal of the Telecommunications Act of 1996 is to preserve and advance universal service. The 1996 Act provides that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high[-]cost areas, should have access to telecommunications and information services....” In the Further Notice of this proceeding, we sought to identify the impediments to increased telecommunications deployment and subscribership in unserved and underserved regions of our Nation, including tribal lands and insular areas, and proposed particular changes to our universal service rules to overcome these impediments. Although approximately 94 percent of all households in the United States have telephone service today, penetration levels among particular areas and populations are significantly below the national average. For example, only 76.7 percent of rural households earning less than \$5,000 have a telephone, and only 47 percent of Indian tribal households on reservations and other tribal lands have a telephone. ***These statistics demonstrate, most notably, that existing universal service support mechanisms are not adequate to sustain telephone subscribership on tribal lands.***

In this Order, we take the first in a series of steps to address the causes of low subscribership within certain segments of our population. ***The extent to which telephone penetration levels fall below the national average on tribal lands underscores the need for immediate Commission action to promote the deployment of telecommunications facilities in tribal areas and to provide the support necessary to increase subscribership in these areas.*** We adopt measures

⁷ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, First Report and Order*, 25 FCC Rcd. 1583, 1585 (footnotes omitted, emphasis added).

at this time to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands, based on the fact that American Indian and Alaska Native communities, on average, have the lowest reported telephone subscribership levels in the country. Toward this end, we adopt amendments to our universal service rules and provide additional, targeted support under the Commission's low-income programs to create financial incentives for eligible telecommunications carriers to serve, and deploy telecommunications facilities in, areas that previously may have been regarded as high risk and unprofitable. By enhancing tribal communities' access to telecommunications services, the measures we adopt are consistent with our obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance. *Specifically, by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase their access to education, commerce, government, and public services. Furthermore, by helping to bridge the physical distances between low-income consumers on tribal lands and the emergency, medical, employment, and other services that they may need, our actions ensure a standard of livability for tribal communities.*⁸

The same rationale supports adoption of an E-rate Tribal Priority similar to the Broadcast Tribal Priority. Without access to broadband at its schools and libraries, Tribes are increasingly hamstrung in their efforts to "improve their condition," and "promot[e] tribal self-sufficiency and economic development," especially where access to jobs and many government programs increasing require internet access.

In terms of the logistics of adopting an E-rate Tribal Priority, the NNTRC suggests the following approach.

- 1) **E-rate Support Should Mirror Lifeline Support.** At a minimum, the percentage of E-rate support afforded institutions serving substantial Native populations (as further defined below) should equal to or exceed the percentage of overall Lifeline support that goes to Tribal members. The Tribal Enhanced Lifeline program has made major strides in increasing

⁸ See Federal-State Joint Board on Universal Service (Twelfth Report and Order), FCC 00-208 (released June 30, 2000), ¶¶ 2 & 5 (footnotes omitted, emphasis added).

telephone penetration in Indian Country, and can serve as an important indicator as to the level of support that will be required to bring broadband to schools and libraries serving Tribal members. Over the past three years, for example, the percentage of total Lifeline payments that have gone to those living in Tribal areas has been:

- a. 2010: 7.62% (\$92.8 million of \$1.21 billion)
- b. 2011: 7.20% (\$118.1 million of \$1.64 billion)
- c. 2012: 11.71% (\$249.8 million of \$2.13 billion)⁹

This averages out to 8.84% over the past three years. Because of changes made to the Lifeline program in 2012,¹⁰ the gross amount spent on the Lifeline program will be less in years to come,¹¹ yet the NNTRC anticipates (and certainly hopes), that the percentage of the Lifeline program supporting Native Americans should remain roughly the same. Thus, under this proposal, the FCC would instruct USAC to adopt a Tribal Priority, whereby no less than 8.84 percent of the Schools and Library Program support be directed toward supporting schools and libraries with significant Native American populations.

2) **Any E-rate Supported School With Enrollment of More than 50 Percent Tribal**

Members Should Receive Support at the Maximum (90 Percent) Level. Only 22 percent of American Indians and Alaska Natives actually live on reservations or other trust lands.¹² 60 percent of American Indians and Alaska Natives live in metropolitan areas, many of these adjacent too, but off of, reservations.¹³ Schools that serve substantial Native American

⁹ Source: USAC Spreadsheet entitled “LI05 -- Annual Low Income Support Amounts by State and Company-2010 through 4Q2012,” available at <http://www.usac.org/about/tools/fcc/filings/2013/q3.aspx>.

¹⁰ See, *Lifeline and Link Up Reform and Modernization, Report and Order and Further Notice of Proposed Rulemaking*, 27 FCC Rcd 6656, 6662–67, ¶¶ 11–18 (2012) (*Lifeline Reform Order*).

¹¹ See, *Lifeline Reforms Saved More than \$210 Million in 2012*, News Release, December 19, 2012.

¹² See Office of Minority Health, American Indian/Alaska Native Profile, available at: <http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlID=52>.

¹³ *Id.*

populations intermixed with other non-Native children often do not qualify for support at levels that meet the funding cuts today. Recognition of this is necessary if the 78 percent of Native Americans living off reservation are to be able to gain access to broadband services.

- 3) **Within Each Funding Percentile Range, Priority Should Be Given to Schools and Libraries Serving Native Populations.** In other words, if overall funding is available for schools and libraries falling below the maximum support level of 90%, a priority should be given to funding those schools and libraries which provide service to substantial Native American populations (greater than 25%). This approach would benefit schools and libraries that have Native American populations that are substantial, but fall short of the 50% threshold discussed in recommendation two above that would put them in the 90% category.

Adoption of an E-rate Tribal Priority in this manner would both increase the likelihood that schools and libraries serving significant Native American populations would receive support, and also incentivize service providers and carriers to actively engage with Tribes to provide service to such schools and libraries. As the Enhanced Tribal Lifeline program has demonstrated on the Navajo Nation, if sufficient incentives are provided (with necessary safeguards against waste, fraud and abuse), providers are willing to come into Indian Country, often for the very first time.

2. Deploying Fiber (Paragraphs 75-77)

In paragraphs 75-77 of the *E-rate NPRM*, the Commission asks whether it should prioritize special construction charges to deploy fiber or other technologies from middle mile networks to schools and libraries.¹⁴ The NNTRC submits that whatever the FCC decides in this regard, that it adopt technology-neutral policies that do not penalize or hinder Tribes located far

¹⁴ *E-rate NPRM*, ¶ 75.

across the Digital Divide.¹⁵ Any attempt to adopt policies that even inadvertently favor less rural, or less impoverished, schools and libraries will have a lasting negative effect on Tribes. Before the Commission embarks on widening the pipe delivered to each school or library, it must assure that at least some form of broadband is available to all schools and libraries. Funding bigger “pipes” to more urban schools because they are cheaper than funding thinner “pipes” in very rural areas widens the Digital Divide, it does nothing to narrow it.

The NNTRC does agree with Paragraph 76, where the FCC asks whether “there [is] a role for the states or Tribal governments to play in determining priority for such funds.”¹⁶ Tribes must be consulted on E-rate funding matters, as they are in the best position to assess the needs of their members, and assist in allocating funding in the most efficient manner, where it will do the most good. In this regard, the Commission should provide additional resources within ONAP to conduct this consultation.¹⁷ As discussed more fully above, this should be done in conjunction with the adoption of a Tribal Priority for E-rate funding.

Finally, in this section, the Commission asks the following:

How should we address the needs of schools and libraries in areas where fiber is far less likely to be offered or available, such as Tribal lands? Are there other solutions such as fixed wireless or cable solutions that would be sufficient today or in the future for meeting such schools’ and libraries’ high-capacity broadband needs? Are there deployment costs associated with any of those technologies that should be supported by the E-rate program?¹⁸

¹⁵ See *Id.*, ¶ 77 (“If we prioritize some funding for new high-capacity broadband deployment should we be technology neutral or should we prioritize fiber connectivity over other types of broadband connectivity?”)

¹⁶ *Id.*, ¶ 76.

¹⁷ The NNTRC submits that this function must reside at the FCC, and not at USAC. Whereas ONAP has earned great respect in Indian Country since its inception, the experience with USAC, at least for the Navajo, has not been good, to say the least. See NNTRC Comments in this proceeding, p. 6, note 17 and p. 26.

¹⁸ *E-rate NPRM*, ¶ 77.

The fundamental problem with this is the fact that the vast majority of Tribes are unable to answer these questions, because they lack the internal technical expertise to be able to make these engineering trade studies.¹⁹ The stark reality is that for many Tribes, they become part of the E-rate program only because someone (often a telecommunications provider), proposes a technical solution for bringing broadband to their schools and libraries in a wholly uncompetitive market. Tribes often are put at the mercy of such providers, not only as to whether the technical solution chosen was the best fit, but also as to regulatory compliance matters. Here again, only through the good offices of ONAP can the Commission hope to help Tribes with engineering and regulatory expertise to be able to help answer these questions for themselves.

3. Bringing Down Recurring Costs (Paragraph 89)

The Commission next addresses the issue of how to bring down recurring costs, and proposes a number of measures that might do so.²⁰ The NNTRC supports any efforts the Commission can make in assisting Tribes to understand whether a proposal makes sense (from a cost and efficiency standpoint), such as providing guidelines on per-megabit prices. The NNTRC does not support, however, firm maximum prices, because there undoubtedly will be many cases on Tribal Lands where it will be impossible to deliver broadband to schools and libraries for less than the maximum price set by the FCC. If the Commission does adopt maximum prices, it should exempt Tribes from those prices in the same way it has exempted Tribes from various other limits within the USF program (such as Lifeline and Link-up). This

¹⁹ For those Tribes who do have such expertise, the technologies deployed on Tribal lands are as varied as the lands themselves, all the more reason to make sure that policies be technology neutral. The one thing that must be said here, however, is that because of the almost total lack of access to spectrum by Tribes, use of wireless licensed spectrum to deliver broadband to schools and libraries is not a viable option for any Tribally-initiated delivery of broadband to schools and libraries. Unless and until the FCC adopts some of the proposals in Dockets 11-40 and 11-41 (e.g., secondary market negotiation rules and “build or divest” requirements), Tribes lack the ability to self-provision solutions using wireless technologies in the licensed spectrum.

²⁰ *E-rate NPRM*, ¶ 89.

should be done to reflect the fundamentally different state of deployment of telecommunications infrastructure on Tribal Lands compared to the rest of the country. The same analysis applies to the suggested per-student or per-building limits proposed in Paragraphs 138-140. Because Indian Country is so different from the rest of America, Tribes should be exempted from such caps, or at least provided the opportunity to demonstrate that any limits should not be applied to them through an easily accessible and transparent waiver process.

4. **Form 470 Reforms (Paragraphs 203-204)**

The Commission also seeks input on whether rules should be put into place to ensure that in situations where there is only a single bidder for services, prices are reasonable.²¹ As the Commission points out, however, capping costs in single-bidder situations unreasonably penalizes highly rural areas such as Indian reservations. Even with the advent of new providers on the Navajo Nation, the NNTRC remains concerned that layering on additional rules, or imposing flat caps on providers who are the only bidders to serve these areas, could significantly chill the market. In effect, bidders would not only have to bid against other potential bidders, but would also have to assess whether to bid at all if they could not reasonably deliver service under an artificial cap set by the FCC.

The NNTRC agrees with the FCC that Tribes need additional assistance and education when it comes to the availability of master contracts or other contract mechanisms that could reduce the amount of USF support required.²² To this end, the NNTRC urges the FCC to direct USAC to establish a formal position of Tribal Liaison, whose duties would include assisting Tribes in participating in the USF programs, and interface with the FCC's ONAP in education and outreach efforts. Expending minor resources in this area ultimately could save the Schools

²¹ *E-rate NPRM*, ¶ 203.

²² *Id.* at ¶ 204.

and Libraries Program millions of dollars by helping Tribes better identify better and more cost effective solutions to bringing broadband services to Tribal schools and libraries.

III. CONCLUSION

The NNTRC supports many of the proposals put forth in the *E-rate NPRM*. When it comes to Native Nations, however, that they are fundamentally different from the rest of America, any modifications to the E-rate Program must take into account both the sovereignty of Native Nations, as well as the trust relationship that exists between the FCC and individual Tribes. Only through proper consultation with Tribes, and the adoption of rules that do not hinder, but rather attack head on the deplorable state of deployment in Indian Country, can the FCC ever hope to narrow the Digital Divide. The NNTRC therefore requests that the FCC adopt the proposals set forth herein, and in the NNTRC's initial Comments.

Respectfully submitted,

NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION

By: _____/s/
James E. Dunstan
Mobius Legal Group, PLLC
P.O. Box 6104
Springfield, VA 22150
Telephone: (703) 851-2843



Counsel to NNTRC

By: _____/s/
Brian Tagaban
Executive Director
P.O. Box 7740
Window Rock, AZ 86515
Telephone: (928) 871-7854

By: _____/s/
Kandis Martine
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515
Counsel to NNTRC

Dated: November 8, 2013